

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPLICATION NO.1259 OF 2019
IN
CRIMINAL APPEAL NO.510 OF 2019**

Abdulla Gulam Ambia Naje

...Applicant/Appellant

vs.

The State of Maharashtra and Anr.

...Respondents

Mr. Manoj Mohite i/b Mr. Shantanu R. Phanse for the Appellant.

Mrs. M. H. Mhatre, APP for the Respondent/State.

**CORAM : B. P. DHARMADHIKARI &
SANDEEP K. SHINDE, JJ.**

DATE : 03/10/2019.

PC.:

. Accused convicted by Special Judge under POCSO Act 2012 for offence under section 376 (2)(f)(i), 354, 506 of IPC and under sections 6 and 8 of POCSO Act is before this Court seeking bail. Submission is neither the victim nor her elder sister (both minor) have supported the case of prosecution nor their father brought anything on record to the prejudice of the present applicant. The contention is all these three witnesses exonerated the applicant.

2. Evidence of complainant mother is assailed by pointing out that she gave wrong date of learning about the offence and also about communicating to her husband. Our attention is invited to evidence of Dr. Nidhi to urge that on 14/10/2017 the mother had not disclosed the name of accused at all.

3. Learned counsel for the applicant therefore states that a false case has been prepared and the applicant has been falsely implicated.

4. Learned APP on the other hand pointed out the material on record including the fact that victim was admitted in hospital, report of Dr. Nidhi of her physical condition and submits that some error in disclosing date by mother cannot be seen as fatal. History given by accused at the time of his medical examination by Doctor Deepak is also relied upon.

5. Perusal of deposition of victim shows that while answering question put to her she has accepted that she was admitted in hospital. She has also accepted that she was attending masjid to learn Quran and accused was teaching the same. However, thereafter she has not accepted remaining part of story as narrated by prosecution.

6. Deposition of her elder sister then aged about 13 years has also been recorded in question answer form. She has accepted that she was going to learn Quran along with her sister and accused used to teach Quran. To the question about what happened when she used to learn Quran she has answered that her sister(victim) had stomach pain and there used to be irritation while urinating.

7. Father of both these girls has stated that his daughters used to go to Masjid to learn Quran and accused used to teach there. He however states that in the month of October or November 2017 on 9th day when he had been to Nashik he received a call that his daughter was beaten severely. Hence he came home. He learnt that accused had done something with his daughter. Trial Court has recorded in bracket in hindi that it was told that relation was done. He denied suggestion given to him about mode and manner in which victim was treated by accused.

8. Evidence of mother shows that she has stated that victim told her about the incident on 9/10/2017. However she has corrected herself in cross examination and stated that it was on 8/10/2017. She also stated that she had taken her daughter to doctor on Thursday. That Doctor was not examined. It appears that 8/10/2017 was Sunday. Thus, there is some cross examination about date on which the mother got knowledge. Though she has initially stated that her husband came on 12/10/2017, in cross examination she accepted that her husband came back on Tuesday. She has expressly stated that it would be incorrect to say that her husband came back from Nashik on 12/10/2017.

9. It appears that on 14/10/2017 she took daughter to hospital and then on advise of Doctor went to police station to lodge report. After lodging report on 14/10/2017 victim was examined again on 15/10/2017.

10. Evidence of Doctor Nidhi is in relation to this examination. Paragraph 4 of her deposition shows old healed hymen tear. She has opined that sexual intercourse/assault cannot be ruled out. It appears that the swabs were collected and final opinion was reserved.

11. In answer to Court question this Doctor has stated that victim on 14/10/2017 told her about assault at Masjid but then had not given name of assailant. Mother also did not disclose name of accused on 14/10/2017.

12. It appears that on 13/10/2017 victim was to appear for school examination and hence she was taken on 14/10/2017. PW-7 Dr. Nidhi has examined patient 4-5 days after the incident and as such has given opinion as mentioned supra. It is admitted position that final opinion has not been given thereafter.

13. Perusal of evidence of PW-9 Dr. Deepak shows the outcome of physical examination of accused. In the course of his deposition he has also pointed out the history as narrated by accused to him.

14. Learned counsel for the applicant has submitted that said narration of history is liable to be discarded. He also submits that in absence of final opinion the offence under section 376 supra cannot be said to be proved.

15. Even if answer given by accused to Dr. Deepak is ignored, still the evidence of sister of victim then aged about 13 years and of victim herself then aged about 10 years cannot be lightly brushed aside.

16. Father also has accepted something about making of relation was communicated to him. The mother of victim has however supported the prosecution story. Error in date or dates while deposing in Court are not fatal. We therefore find no case made out by the applicant for bail at this stage.

(SANDEEP K. SHINDE, J.)

(B. P. DHARMADHIKARI, J.)